BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

*****

IN THE MATTER	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
	)	
CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues	)	
	)	
	)	

To: The Commission (filed electronically)

COMMENTS OF THE MONTANA SMALL RURAL INDEPENDENTS (MSRI)
IN RESPONSE TO THE FCC′S NOTICE SEEKING COMMENTS ON
ITS INITIAL REGULATORY FLEXIBILITY ANALYSIS

Comes Now, the Montana Small Rural Independents (MSRI), consisting of Ronan Telephone Company (RTC), Hot Springs Telephone Company (HSTC), and Lincoln Telephone Company (LTC), submitting the following comments to the Federal Communications Commission in the above referenced Docket, in response to the FCC′s Notice seeking comment on its Initial Regulatory Flexibility Analysis; 70 Fed.Reg. 41655 (July 20, 2005).

I. INTRODUCTION AND BACKGROUND

The United States Court of Appeals issued a stay of the FCC′s Intermodal LNP Order[1] on March 11, 2005, based on the failure to comply with the Federal

[1] FCC Order 03-284, rel. November 10, 2003.

Regulatory Flexibility Act (RFA), *USTA v. FCC*, 400 F.3d 29 (D.C.C.A. 2005). Prior to the Court's ruling, small rural LECs in Montana obtained suspensions of the FCC LNP Order from the Montana Public Service Commission pursuant to 47 U.S.C. §251(f)(2).[2] Pursuant to the Montana PSC Orders, suspensions were granted containing various implementation dates and conditions. RTC and LTC's implementation dates would have been January, 2006, but of course, were superseded by the Court of Appeals decision.[3]

The Federal Regulatory Flexibility Act requires the FCC to consider the impacts of a proposed new rule on small entities, and specifically in this case, the costs, technical obstacles and additional harmful impacts of implementing Intermodal LNP. The agency's "Initial Regulatory Flexibility Analysis" must describe the impacts of the proposed rule on small entities, projected compliance costs, and must consider alternatives available that would minimize the economic impacts on small entities, including the possibility of exempting small companies from the rule; *See*, 5 U.S.C. §603. RTC, HSTC and LTC qualify as small entities, and are subject to the protections of the Regulatory Flexibility Act; 5 U.S.C. §601. RTC, HSTC and LTC are also small rural carriers with the protections of the rural exemptions pursuant to 47 U.S.C. §§251(f)(1) and (f)(2).

<u>II. TECHNICAL OBSTACLES</u>

[2] Montana PSC Docket D2004.3.39

[3] LTC's implementation is also contingent upon receiving six months advance notice by receipt of a *bona fide* request (BFR).

Many small LECs, including RTC, HSTC and LTC, do not have direct local interconnections with wireless carriers in their exchanges. That is, there is no "Point of Interconnection" or "Point of Presence" with wireless carriers in their local exchanges.[4] In many cases, there are also no interconnection agreements in place establishing reciprocal compensation rates between the carriers. The lack of any direct interconnection and the lack of compensation arrangements creates significant and extremely problematic technical and cost obstacles to LNP implementation. Without a direct connection in the local exchange, intermodal number porting is technically uncertain and highly costly. The Kansas Corporation Commission recently held that lack of a POI (Point of Interconnection) within a small rural carrier's rate center, renders intermodal LNP "technically infeasible" within the meaning of Section 251(f)(2) of the Act.[5]

It has been suggested that transiting facilities might be used to accomplish LNP in rural exchanges without direct connections with wireless carriers (e.g. using RBOC transport facilities to indirectly connect with wireless carriers). This is a questionable and unsatisfactory alternative due to the technical uncertainties, competitive discrimination, and costs involved. It is highly uncertain if Qwest (or other RBOCs) would allow such transiting of LNP traffic, what the costs to the rural carriers would be, whether it would be technically feasible, and whether accurate measurement and billing of traffic would be possible. It would also exacerbate the "phantom traffic" issue, which is already problematical in the industry. It could also result in customers unknowingly making long distance (toll

[4] RTC does have a local connection with one small wireless carrier, but not with any of the major wireless carriers.

[5] *In the Matter of the Petition of Twin Valley Telephone,* Kansas Corp. Comm. Docket No. 05-TWVT-1092-MIS, Order, 2005 Kan.PUC LEXIS 996 (July 29, 2005); and, *In the Matter of the Petition of Wamego Telecommunications Co.*, Kansas Corp. Comm. Docket No. 05-WTCT-1093-MIS, Order, 2005 Kan.PUC LEXIS 997 (July 29, 2005).

rated) calls, causing loss of customer goodwill, dissatisfaction, and violation of the FCC's requirement that local ported calls be rated the same.[6]

[6] The FCC goes beyond the Act's definition of number portability, by requiring "location portability" beyond the local rate centers; *See, supra*. p. 9.

Using transiting facilities, if such an alternative is possible and economically viable, would nevertheless perpetuate the RBOC bottleneck/monopoly on transport facilities, which is contrary to the Act's goal to increase competition. If the Commission requires direct connections as a prerequisite to LNP for rural carriers, it would encourage the establishment of alternative transport facilities to rural areas, and would therefore promote greater competition in those areas.[7]

The Montana Small Rural Independents herein have had experience with common trunk groups that are used by Qwest for "transiting" of unidentified (phantom) third party traffic. The use of transiting facilities by carriers results in difficult, long-term and as yet unresolved problems of identification, measurement and compensation; as well as the resulting expensive legal disputes. The Montana Small Rural Independents and other Montana LECs were engaged in over five years of litigation as a result of the use of transiting facilities by wireless carriers to avoid intercarrier compensation, and are convinced that direct connections are much preferred to secure high quality service, proper measurement and identification of traffic, and to assure payment of appropriate compensation to protect universal service goals in rural areas. Most rural carriers are unable to separately identify, measure, or block traffic on transiting facilities, and are therefore unable to assure collection of unpaid access or reciprocal compensation by separately blocking individual carriers' traffic.

For the foregoing reasons, the lack of direct interconnections between rural ILECs and wireless carriers present technical impediments and significant adverse economic impacts on rural carriers and rural communities. Therefore,

[7] The wireless industry is now mature and financially able to extend their local interconnections into rural America, just as the IXC industry bears the costs of transporting calls to rural America.

without these direct interconnections being established, intermodal LNP should not be required in rural areas.

III. COMPETITIVE AND POLICY ISSUES

The continued lack of consumer demand and lack of competitively neutral implementation are strong policy reasons that intermodal LNP should not be required at this time for small rural carriers.

The Montana Small Rural Independents, RTC, HSTC and LTC, have not received LNP requests from their customers.[8] Other rural companies have received few, if any, requests for intermodal LNP. The lack of any significant demand is a strong policy reason against imposing a costly new requirement on small entities, and is contrary to the intent of the Federal Regulatory Flexibility Act.[9] Furthermore, in areas where there is no viable wireless service at all (for example, in HSTC and LTC's service areas), it is illogical, unnecessary and patently unreasonable to impose any LNP requirement.

The Telecommunications Act and the FCC rules themselves require competitively neutral regulation of telecommunications.

> The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission. 47 U.S.C. §251(e)(2) (emphasis added); *See also*, 47 U.S.C. §202 and 47 C.F.R. §52.9(a)

But, the Commission failed to require wireless carriers to port numbers to wireline carriers under the same conditions, despite the blanket requirement that wireline

8 RTC received one call asking for information regarding LNP.

9 5 U.S.C. §§603 and 604.

carriers port numbers to wireless carriers.[10] This lack of a "reciprocal" LNP requirement applicable to wireless carriers results in a severe competitive disadvantage to rural carriers. That is, customers cannot switch their numbers from wireless to wireline carriers, and if they switch to a wireless carrier they could not later change their mind and switch their number back to a wireline carrier. This situation is extremely anti-competitive.

[10] FCC Intermodal LNP Order, 03-284, ¶¶ 11, 22 and 42.

The FCC's Intermodal Order also requires small entities to provide "location portability." *See, USTA v. FCC*, 400 F.3d 29, 35-39 (D.C.C.A. 2005); *See also*, *In Re StarNet*, 355 F.3d 634 (7th Cir. 2004). This requirement is not only unreasonably costly and burdensome for small companies, contrary to the intentions of the Regulatory Flexibility Act, but is also inconsistent with the Act's definition of number portability, and therefore beyond the Commission's authority. Number portability, as defined by the Telecommunications Act, is expressly limited to porting numbers "at the same location" 47 U.S.C. §153(30). Since the Intermodal Order requires location portability,[11] it exceeds the Commission's authority under 47 U.S.C. Section 251(b)(2).[12]

The use of transiting facilities to reach rural areas, rather than direct connections, exacerbates the cost and competitive disparities of Intermodal LNP for rural communities. Wireless carriers are often obtaining terminating access to rural areas without paying any compensation to the rural wireline carriers, which deprives small rural companies of needed revenues and adversely affects those carriers' ability to provide affordable universal service. Many rural wireline customers must still use the toll network to make local calls to wireless phones, while wireless companies can take advantage of free terminating service (due to uncompensated transiting traffic) by offering their customers very low rates to make local calls to wireline customers. This creates a competitive disparity, granting the wireless carriers a competitive advantage over wireline carriers due solely to regulatory fiat. These factors combine to create large cost and technical

---

11 *See*, FCC Intermodal LNP Order 03-284, ¶¶ 1 and 26.

12 47 U.S.C. §251(b)(2) grants the FCC authority to establish "number portability" requirements that are technically feasible; but the definition of "number portability" in 47 U.S.C. §130(30) excludes location portability. The Court of Appeals failed to address this issue in its March 11, 2005 decision, *See* 400 F.3d 29 at 39.

obstacles (that are largely uncertain) for small companies attempting to port numbers outside of their rate centers.

The Commission's rule regarding recovery of LNP implementation costs requires that all *remaining wireline* customers (i.e. the customers that do *not* port their numbers) must pay the *entire* cost of implementation; 47 C.F.R. §52.33. Due to the high relative costs of LNP implementation for small companies, and the smaller customer base to spread those costs, this can result in very large end user LNP surcharges (*See e.g.*
Exhibit #1 attached hereto). This is directly inconsistent with the basic public utility ratemaking principle that the "cost causer" should directly pay the costs incurred to provide a service,[13] as well as universal service goals of affordable basic service in rural areas (47 U.S.C. §254).

IV. COST ISSUES

The "Final Regulatory Flexibility Analysis" required by the RFA must contain a substantive and thorough description of the steps taken by the Commission to address and minimize the significant economic effects on small entities; 5 U.S.C. §604. The Commission must address the significant costs and economic impacts on small entities if compliance with the Intermodal LNP Order and rule is required, and craft an alternative or exemption that will reduce or eliminate those costs; otherwise, the Commission's Order will again be subject to reversal and remand by the Court of Appeals pursuant to the Regulatory Flexibility Act. *See e.g. Southern Offshore Fishing Association v. Daley,* 995

[13] James C. Bonbright, PRINCIPLES OF PUBLIC UTILITY RATES, pp. 382-385, (1988); and Charles F. Phillips, Jr., THE REGULATION OF PUBLIC UTILITIES, pp. 380-381 (1985).

F.Supp. 1411, 1434-1435 (M.D.Fla. 1998).

The Court of Appeals, in staying the FCC's Intermodal LNP decision, ruled that the FCC completely failed to consider the economic impacts on small entities as required by the RFA.[14] These impacts were presented to the FCC in comments filed prior to the issuance of the November, 2003 Intermodal LNP Order; however, the FCC neglected to consider their adverse effects on small entities, and failed to consider alternative less costly alternatives, or an exemption for small companies. Pursuant to the Court of Appeals decision, the FCC is now required to engage in this analysis and modify its decision in accordance with the evidence before it.

The costs to implement LNP for small companies is significant but difficult to know with certainty in advance, because of two crucial unknown variables: 1) the cost to transport ported numbers outside of the exchange when no local point of interconnection exists with wireless carriers; and 2) the number of customers who will actually port their numbers. RTC attempted to estimate the costs of LNP implementation in the Montana PSC proceeding requesting a suspension, Montana PSC Docket No. D2004.3.39. RTC's estimated costs are attached hereto as "Exhibit #1." Wireline consumers in RTC's service area could have to pay an LNP surcharge as high as **$13.48 per month**, to enable other consumers to port their numbers to wireless carriers. This would result in an increase in local service rates of 75% above the current RTC EAS rates of $18.00 per month.[15]

---

[14] "there is no dispute that the FCC utterly failed to follow the RFA when it issued the *Intermodal Order*." *USTA v. FCC*, 400 F.3d 29, 41 (D.C.C.A. 2005).

[15] This is a based on an estimate of implementation costs provided in Montana PSC Docket No. D2004.3.39. The estimate is speculative, and depends upon a number of unknown variables, including demand for LNP, transport costs, reciprocal compensation rates, toll rates (if calls must be transported via IXC networks), and the method that would be used to transport ported calls when direct interconnections do not exist. Costs would also depend upon whether there is a transiting carrier available, whether the transiting carrier would allow porting, at what rates, and on other potential conditions and technical obstacles.

Given the current lack of demand for LNP service (even after significant publicity of the service in the national and state press) and the disproportionately large cost in rural areas, where the cost must be spread over a very small customer base, the implementation of LNP is contrary to sound public policy and the goals of the Regulatory Flexibility Act to avoid significant and unnecessary adverse economic impacts on small entities. This conclusion is underlined by the fact that the definition of "number portability" in the Act is limited to the "same location," while the FCC's Order inappropriately extends that definition nationwide, greatly increasing the costs for rural companies.

Serious cost and technical issues remain major concerns for small companies when direct connections with wireless carriers have not been established in the local exchange. The FCC's Intermodal LNP Order recognized but failed to address the problem of "rating, routing and transport" outside of rate centers.[16] The FCC's Order requires "location portability" of numbers to locations outside the local exchange, but simultaneously requires that such calls be "rated the same" (Intermodal LNP Order, ¶¶28 and 39-40). Under these circumstances, a disproportionately large and unfair cost burden is placed on small companies and their customers (who do not use or benefit from LNP) without any significant or demonstrable public benefit, and beyond the intent of Congress. A full and accurate assessment of the costs on small entities cannot be completed until these issues are resolved. Therefore, it is inequitable and inconsistent with the intent of the RFA to consider imposing any LNP requirements on small companies until after these issues are resolved in a manner that is equitable for residents and business consumers in rural communities.

[16] FCC Order 03-284, ¶¶39-40 and Separate Statement of Comm. Adelstein, Paragraph 4.

SUMMARY AND RECOMMENDATIONS

The requirements of the Regulatory Flexibility Act have not been satisfied. The Commission's Initial Regulatory Flexibility Analysis (published July 20, 2005) fails to fully describe the compliance "Catch-22" created by the FCC's Order: small companies are required to port numbers to distant rate centers but simultaneously maintain the rating of the calls as local. The Initial Regulatory Flexibility Analysis also fails to fully describe available alternatives, and how those alternatives would minimize the significant adverse economic impacts on small entities. As such, this new proceeding by the Commission is flawed and in violation of the RFA, and would be again be subject to reversal on appeal unless these problems are substantively addressed and resolved, or an indefinite exemption for small ILECs is granted.

The Telecommunications Act does not give the FCC the authority to require location portability, and explicitly limits number portability to the "same location." Therefore, the FCC's broader interpretation cannot be imposed on rural carriers, especially in light of the high and largely unpredictable costs faced to comply with this requirement.

Due to the large and uncertain costs involved and the technical obstacles faced by small companies without direct connections with wireless carriers, the Court's stay of the LNP rules should remain in place until the Commission adequately and equitably addresses the transport, rating and routing issues. These issues must be adequately resolved to alleviate the undue costs. The Commission should require direct connections between wireline and wireless carriers in rural exchanges. Direct connections should be a mandatory prerequisite to any intermodal LNP requirement for small LECs.

In areas without any wireless service, it serves absolutely no logical purpose to require a small company to implement LNP, since there is no wireless provider in the area. The Commission recognized this situation in its Intermodal Order (at ¶20) and this exception should be reaffirmed in the new Commission decision. For carriers in these areas (which includes LTC and HSTC), an indefinite exemption from the LNP rules should be granted in accordance with the Regulatory Flexibility Act. The new order should clarify that LNP is not required unless there is viable, quality wireless service throughout (not just overlapping) a rural carrier's service area, *See* Intermodal Order, ¶20.

WHEREFORE, the Montana Small Rural Independent (MSRI) companies, Ronan Telephone Company, Hot Springs Telephone Company, and Lincoln Telephone Company, respectfully request that an indefinite exemption from Intermodal LNP be issued in this proceeding for all rural companies, unless there is adequate wireless service provided throughout the rural exchange, and unless the wireless carrier requesting LNP

has a direct connection with the rural carrier and compensation arrangements are in place for the exchange of traffic.

DATED: August 19, 2005

Respectfully Submitted,
/s/

Ivan C. Evilsizer

Attorney for Montana Small Rural Independents
Ronan Telephone Company,
Hot Springs Telephone Company
Lincoln Telephone Company

Evilsizer Law Office
2033 11th Avenue, Suite #7
Helena, MT 59601
Telephone: (406) 442-7115
Fax: (406) 442-2317
e-mail: evilsizer2@aol.com

Exhibit #1
Montana PSC Docket No.2004.3.39

ESTIMATED LNP IMPLEMENTATIONS COSTS
SEPTEMBER 3, 2004

	Hardware	Software	Translations	Data Dips	Maintenance*	Transport**
Non-Recurring	$0.00	$51,600.00	$2,500.00	$3,120.00	$10,000.00	$5,000.00
Recurring/Monthly	$0.00	$0.00	$313.00	$593.00	$1,200.00	$50,625.00

Estimated LNP Access Line Monthly Surcharge **$13.48*****

* Maintenance includes estimated full labor costs for personnel, database maintenance, programming, central office engineering and training, customer service training and system development.

** RTC contends that LNP is technically infeasible; and RTC cannot comply with both of the FCC Order's provisions that ported calls must be rated the same, while no direct interconnection is required. The estimated transport costs are therefore hypothetical estimates which are only pertinent if these legal obstacles can be overcome.

*** The size of this surcharge assumes that the wireless substitution rate for wireline that Western Wireless predicted in its testimony will continue to accumulate over five years (3% per year). RTC believes that such a large surcharge paid by customers who do not benefit from LNP will create an artificial incentive resulting in an even larger substitution rate. The large surcharge will probably result in further migration to wireless service, which will result in even larger rate increases, which will then create potentially devastating financial impacts on the Company.